

Judge: Marc Barreca  
Chapter: 13  
Hearing Date: July 31, 2019  
Hearing Time: 9:00 a.m.  
Hearing Location:  
    Everett Station  
    Weyerhaeuser Room, 4th Floor  
    3201 Smith Avenue  
    Everett, WA 98201  
Response Date: July 24, 2019

IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE WESTERN DISTRICT OF WASHINGTON AT SEATTLE

In re:  
AMIE C HOWITZ,  
Debt

IN CHAPTER 13 PROCEEDING  
NO. 18-11348-MLB

OBJECTION TO APPLICATION FOR  
AUTHORIZATION OF EMPLOYMENT  
OF LISTING BROKER

Jason Wilson-Aguilar, Chapter 13 Trustee, objects to debtor's Application for Authorization of Employment of Listing Broker (ECF No. 23):

## I. Introduction

The debtors want to employ Homes & Equity Real Estate Group as the listing broker to sell their real property at 9210 Market Place #B204, Lake Stevens Washington. Jonathan Smith, debtor's bankruptcy counsel, and the principal for Homes & Equity Real Estate Group. Based on Mr. Smith's declaration (ECF No. 23-4) and the seller's closing statement (ECF No. 24-6), Mr. Smith is acting as the broker and closing agent through his escrow company, Advantage Escrow Services.<sup>1</sup> Mr. Smith, through his various business entities, is thus acting as the debtor's attorney, her real estate broker and the closing agent for the sale. Based on the estimated settlement statement (ECF No. 24-6), Mr. Smith will receive \$6,600.00 for his services as a real estate broker and \$950.00 for his services as a settlement agent. Presumably, Mr. Smith will also be charging debtor for his services as bankruptcy counsel. Mr. Smith indicates the following: “[

<sup>1</sup> Based on information and belief, Mr. Smith is the principal of Advantage Legal Group (the law firm); Homes & Equity Real Estate Group (the real estate broker); and Advantage Escrow Services (the closing / settlement agent).

1 represent no adverse interest of the Debtor in this matter upon which I am to be engaged" (ECF  
2 No. 23-4; ¶ 4).

## 3           **II.       Concerns regarding disinterestedness and conflicts of interest**

4           A disinterested person is a person that

5           (A) is not a creditor, an equity security holder, or an insider;

6           (B) is not and was not, within 2 years before the date of the filing of the petition, a  
7           director, officer, or employee of the debtor; and

8           (C) *does not have an interest materially adverse to the interest of the estate or of any  
9           class of creditors or equity security holders, by reason of any direct or indirect relationship to,  
connection with, or interest in, the debtor, or for any other reason.*

10          11 U.S.C. § 101(14) (emphasis added). It is not apparent that Mr. Smith is a disinterested person  
11          within the meaning of Section 101(14), particularly under subsection of (C).

12          In addition, the Rules of Professional Conduct provide:

13           (a) Except as provided in paragraph (b), a lawyer shall not represent a client if the  
14           representation involves a concurrent conflict of interest. A concurrent conflict of interest  
15           exists if:

16           (1) the representation of one client will be directly adverse to another client;  
or

17           (2) there is a significant risk that the representation of one or more clients  
18           will be materially limited by the lawyer's responsibilities to another client, a former client  
or a third person or by a personal interest of the lawyer.

19           (b) Notwithstanding the existence of a concurrent conflict of interest under paragraph  
20           (a), a lawyer may represent a client if:

21           (1) the lawyer reasonably believes that the lawyer will be able to provide  
competent and diligent representation to each affected client;

22           (2) the representation is not prohibited by law;

23           (3) the representation does not involve the assertion of a claim by one client  
against another client represented by the lawyer in the same litigation or other proceeding  
before a tribunal; and

24           (4) each affected client gives informed consent, confirmed in  
writing (following authorization from the other client to make any required disclosures).

25          Wash. Rules of Prof'l Conduct R. 1.7 (2006). It is unclear if this Rule of Professional Conduct  
26          has been satisfied. It is also unclear if the necessary informed consent was obtained from all  
27

1 relevant parties, although the debtor apparently signed a purported conflict waiver (ECF No. 23-  
2 6).

3 A closing agent and real estate agent are separately defined. Wash. Rev. Code §  
4 60.80.005.

5  
6 No closing agent may refuse a written request by the seller or purchaser of a fee  
7 interest in real property to administer the disbursement of closing funds necessary to  
8 satisfy unpaid charges as charges are defined in RCW 60.80.005. Except as otherwise  
9 provided in this subsection (2), a closing agent who refuses such a written request  
10 is liable to the purchaser for unpaid charges for utility services covered by the request. A  
11 closing agent is not liable if the closing agent's refusal is based on the seller's  
12 inaccurate or incomplete identification of utilities providing service to the property,  
13 or if a utility fails to provide an estimated or actual final billing, or written extension  
14 of the per diem rate, as required by RCW 60.80.020, or if disbursement of closing  
15 funds necessary to satisfy the unpaid charges would violate RCW 18.44.00.

16 Wash. Rev. Code § 60.80.010(2). A closing agent has other duties also. *See* Wash. Rev. Code §  
17 60.80.020. It is unclear if Mr. Smith / Advantage Escrow Services can act as an unbiased and /  
18 or neutral closing agent when Mr. Smith is also representing the debtor as her listing broker and  
19 her bankruptcy attorney.

### 20 III. Conclusion and Request for Relief

21 The Trustee and / or his predecessor has raised these issues previously with regard to Mr.  
22 Smith's multiple and potentially conflicting roles. *See In re McVay*, 14-15871-TWD (ECF Nos.  
23 86 and 92); *In re McGowan*, 17-14596-MLB (ECF No. 23); *In re Seal*, 18-14113-MLB (ECF  
24 No. 19); *In re Perez-Escobar*, 15-13368-TWD (ECF No. 63).

25 In *Perez-Escobar*, the court denied Mr. Smith's motion to employ himself and his  
26 company as the debtor's real estate broker. In denying Mr. Smith's motion for reconsideration  
27 of that order, the court noted

28 the peril of acting as both the Debtors' bankruptcy lawyer and real estate  
29 broker. Consistent with the Employment Denial Order, the orders approving the sale  
30 of the Debtors' property [Docket Nos. 74 and 91] prohibit the closing agent  
31 from disbursing any funds to Homes & Equity Real Estate Group or Mr. Smith.  
32 As it currently stands, the Debtors are entitled to the proceeds from the sale that  
33 would have been Mr. Smith's commission had I granted the Employment

1 Application. Advantage Legal Group, Mr. Smith's law firm, filed the Motion  
2 for Reconsideration seeking to reverse the Employment Denial Order and obtain  
3 approval to pay those funds to Mr. Smith, which creates a conflict between Mr.  
4 Smith and the Debtors.

5 *In re Perez-Escobar*, Case No. 15-13368-TWD (Bankr. W.D. Wa. April 4, 2019) (ECF No. 100).

6 In that same case, the Trustee noted that the court had twice ordered that Mr. Smith and  
7 his company could not be paid any amounts from the sale (Case No. 15-13368-TWD; ECF No.  
8 95). Despite those orders, the closing statement provided to the Trustee reflected that Mr. Smith  
9 apparently received \$22,050.00 from the sale in his role as the real estate broker for the debtors  
10 (Case No. 15-13368-TWD; ECF No. 95). The *Perez-Escobar* court ordered Mr. Smith to  
11 explain the disbursement from the sale (Case No. 15-13368-TWD; ECF No. 101). Mr. Smith  
12 responded in a declaration that

13 3. Based on the amended sale order (ECF No. 91) entered on February 27, 2019,  
14 the closing agent did not pay Homes & Equity Real Estate Group or Jonathan  
15 Smith \$22,050.

16 4. Advantage Escrow Services remitted \$22,050.00 to the debtors, Jose S.  
17 Perez-Escobar & Floridalma Ambrocio (see Exhibit #1: Disbursement Worksheet  
18 and a copy of the check payable to the debtors) on April 12, 2019.

19 *Declaration of Jonathan Smith*, Case No. 15-13368-TWD; ECF No. 102; ¶¶ 3 and 4).

20 However, the closing date of that sale was February 28, 2019 (Case No. 15-13368-TWD;  
21 ECF Nos. 95 and 102-1), so it is unclear why Mr. Smith / Homes & Equity Real Estate Group  
22 would have waited to give \$22,050.00 of the sale proceeds to the debtors in that case until April  
23 12, 2019 when the debtors were entitled to those funds at closing. It appears that Mr. Smith may  
24 have held the debtors' funds and did not return them to the debtors until approximately one and  
25 one-half month after the sale.

26 The multiple and possibly conflicting roles in this transaction raise concerns. The  
27 Trustee does not make any assertions one way or the other about these potential issues. The  
28 Trustee raises these issues for the Court's consideration and will continue to do so given the peril  
and potential conflicts of interest presented when Mr. Smith seeks to act as debtor's bankruptcy

1 counsel, real estate broker and closing agent. The Trustee reserves the right to assert additional  
2 bases for his objection.

3 WHEREFORE, the Chapter 13 Trustee requests that the Court deny the Application for  
4 Authorization of Employment of Listing Broker (ECF No. 23).

5 Dated this 24th day of July 2019  
6

7 /s/ Jason Wilson-Aguilar, WSBA #33582  
8 JASON WILSON-AGUILAR  
9 Chapter 13 Trustee  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

OBJECTION TO APPLICATION FOR  
AUTHORIZATION OF EMPLOYMENT OF  
LISTING BROKER - 5

Chapter 13 Trustee  
600 University St. #1300  
Seattle, WA 98101

(206) 624-5124 FAX 624-5282  
Ent. 07/24/19 12:46:28 Pg. 5 of 5